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Additional Brief of Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM 1906

NO. 82.

HOME SAVINGS BANK, PLAINTIFF IN ERROR.

vs.

THE CITY OF DES MOINES, AND THE CITY COUNCIL OF SAID CITY, AS A BOARD OF REVIEW; DEFENDANTS IN ERROR.

IN ERROR TO THE SUPREME COURT OF IOWA.

HORATIO F. DALE AND WM. G. HARVISON, *Attorneys for Plaintiff in Error.*

Due and legal service hereof is hereby accepted and acknowledged at Des Moines, Iowa, this ..... day of March, A. D., 1907.

Attorneys for Defendants in Error.

ADDITIONAL BRIEF OF PLAINTIFF IN ERROR.

Plaintiff in error respectfully asks leave of Court to file the following additional brief, for the purpose of stating more specifically and clearly than was done in its original brief, the ultimate propositions involved in the FOURTH DIVISION of said Brief, and an additional point which should be added to those stated in the FIFTH DIVISION thereof, as follows:—

DIVISION 4. (ORIGINAL BRIEF, PAGE 25.)

At the date of the assessment against Plaintiff in error, there was no Act of Congress authorizing the taxation of the value of the shares of stock of State Banks, in so far as said value was derived from the investment of the capital of such Banks in United States Bonds or other securities. National Banking Acts of 1863 and 1864, the Amendment of 1868, and Rev. Stat. U. S. Section 5219.

The proposition contended for by plaintiff in error, as above stated, depends upon the true construction and interpretation of Section 41 of the National Banking Act of June 3rd 1864, as amended by the Act of February 10th 1868, and the substitute for said Section 41, incorporated in the Revised Statutes of the United States of 1875 and 1878, as Section 5219, in the light of the decisions of this Court on said subjects. We therefore set out these three Sections as follows:—

ACT OF 1864, SECTION 41, (AT THE END OF THE SECTION): *Provided,* That nothing in this Act shall be construed to prevent all the shares of any of the said Associations, held by any person or body corporate, from being included in the valuation of personal property of such person or corporation in the assessment of taxes imposed by or under State authority, at the place where such Bank is located, and not elsewhere:

(FIRST LIMITING CLAUSE): *but not at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State;*

Repealed in 1868

(PROVISO OR SECOND LIMITING CLAUSE): *Provided further,* THAT THE TAX SO IMPOSED UNDER THE LAWS OF ANY STATE, UPON THE SHARES OF THE ASSOCIATIONS, AUTHORIZED BY THIS ACT, SHALL NOT EXCEED THE RATE IMPOSED UPON THE SHARES OF ANY OF THE BANKS ORGANIZED UNDER AUTHORITY OF THE STATE, WHERE SUCH ASSOCIATION IS LOCATED;

There is a final clause of the Section, concerning the taxation of real estate, which we omit, as immaterial, in this case.

The only permission which Congress has ever given to the States to tax the value of the shares of stock of a State Bank derived from any United States Bonds in which the capital of such Bank, or any part thereof, is invested, is that set forth in the *Proviso or Second Limiting Clause* in said Section 41, *supra,* which was repealed in 1868, as hereinafter shown.

ACT OF 1868, AMENDING SAID SECTION 41: That the words "place where the Bank is located, and not elsewhere", in Section forty one (41) of the "Act to provide a National Currency", approved June third (3) eighteen hundred and sixty four (1864), shall be construed and held to mean the State within which the Bank is located; *and the legislature of each State may determine and direct the manner and place of taxing all the shares of National Banks located within said State, subject to the restriction that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of each State; And Provided Always,* That the shares of any National Bank owned by non-residents of any State, shall be taxed in the City or Town where said Bank is located, and not elsewhere.

As hereinafter stated, this Act of 1868 has been construed by this Court as effecting a repeal of the *Proviso or Second Limiting Clause* of Section 41 of the Act of 1864.

REV. STAT. U. S., SECTION 5219, OF 1875 AND 1878; SUBSTITUTE FOR SAID SECTION 41:—Nothing herein shall prevent all the shares in any Association from being included in the valuation of the personal property of the owner or holder of such shares, in assessing taxes imposed, by authority of the State within which the Association is located; but the Legislature of each State may determine and direct the manner and place of taxing all the shares of National Banking Associations, located within the State, subject only to two restrictions;

(FIRST LIMTING CLAUSE, OR FIRST RESTRICTION): *that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State;*

(SECOND RESTRICTION): and that the shares of any National Banking Association owned by non-residents of any State shall be taxed in the City or Town where the Bank is located and not elsewhere.

There is a final clause, concerning the taxation of real estate, which we omit, as immaterial in this case.

THE ACTS OF 1863, 1864 AND 1868: On the subject of Taxation, this Court, in *Van Allen v. Assessors-Bank Tax Cases*, 70 U. S. (3 Wall.) 582, 18 Law 233, decided in 1866, opinion by MR. JUSTICE NELSON, said:

"The first Act providing for the organization of these National Banks, passed 26th of February, 1863, 12 Stat. 664, Ch. "58, contained no provision concerning State taxation of those "shares, but Congress reserved the right, by the last Section, at "any time 'to amend, alter or repeal the Act.' The present Act of "1864, is a re-enactment of the prior statute, with some material "amendments, of which the Section (41) concerning State taxation is one." (Page 582, Law Page 233).

In *Mercantile National Bank v. New York City*, 121 U. S. 162, 30 Law 895, decided in 1886, the opinion, written by MR. JUSTICE MATTHEWS, said:

"The National Banking Act of 1864, 13 Stat, at L. 111, *in addition to the restrictions now imposed upon the State taxation* "of National Banks, declared 'That the tax so imposed under the "'the laws of any State, upon the shares of any of the Associations "'authorized by this Act, *shall not exceed the rate imposed upon "'the shares in any of the Banks organized under the authority of "'the State* where such Association is located'. In the re-enactment of this statute in 1868, 15 Stat. at L. 34, *this proviso was "omitted.* The case of *Van Allen v. Assessors*, 70 U. S. (3 Wall.) "573, 18 Law 229, was decided under the Act of 1864 as originally enacted." (Page 148, Law Page 899.)

U. S. REV. STAT., SECTION 5219: It is plain that in the Revisions and re-enactments of the U. S. Revised Statutes of 1875 and 1878, the proviso of Section 41 of the Act of 1864, concerning the taxation of the shares of stock of State Banks, was omitted. This proviso has not been law since 1868, or at any rate since 1875.

THE PERMISSIVE EFFECTS OF THE ACTS OF 1864, 1868 AND OF REV. STAT. U. S. SECTION 5219: *The main provision* of Section 41 of the Act of 1864 permitted the State to tax the full value of the shares of stock of National Banks, in the manner provided in that section notwithstandig that a large part, or all, of such value was derived from United States Bonds owned by the Na-

tional Bank. This part of that Act has been preserved and re-enacted, without any material change, in the Act of 1868, and in said section 5219, and ever since 1864 has been and is now law.

The Proviso or *Second Limiting Clause* of Section 41 of the Act of 1864 was omitted from the Act of 1868, and from said Section 5219, and has not been law for more than 25 years. *It was this Proviso alone* which authorized the State to tax the full value of the shares of stock of Banks organized under State laws, notwithstanding that a large part, or practically all, of such value was derived from United States Bonds owned by the State Bank, and, in addition to this permission, *compelled the State to so tax the shares of stock of its own Banks, if it desired to avail itself of the permission* given by Congress to the State to tax the full value of the shares of stock of the National Banks located within its territory.

The first Limiting Clause of Section 41 of the Act of 1864 concerning other moneyed capital has been preserved and re-enacted, without change, in the Act of 1868, and in said Section 5219, and is now law.

DECISIONS UNDER THE ACT OF 1864: In *Van Allen v. Assessors,— Bank Tax Cases*, 70 U. S. (3 Wall.) 581, 18 Law 233, decided in 1866, objection was made to the State law, under which the shares of stock of a National Bank had been assessed. One claim made was that the assessment for taxation was not in conformity to Section 41 of the Act of 1864, in that no assessment of the *shares of stock* of State Banks, was provided for or required by the State Enabling Act; and the State Bank *shares* had not been assessed for taxation; but the State statute required an assessment of the *capital* of the State Bank, and the assessment had been so made.

Section 41 of the Act of 1864 is set out, in full, in the opinion in the *'Van Allen' case*, (pages 584-585, Law Pages 234-235). We have quoted this Section 41, *supra*, except the final clause relating to the taxation of realty.

The ground upon which the *'Van Allen' case* was reversed was, that the *proviso or second limiting clause*, relating to the taxation of the shares of stock of State Banks, contained near the end of Section 41 of the Act of 1864, had not been complied with. The decision is thus stated by MR. JUSTICE NELSON:

"The defect is this: One of the limitations in the Act of Con-" gress is: 'That the tax so imposed under the laws of any State, "' upon the shares of the Associations authorized by this Act, "' shall *not exceed the rate imposed upon the shares of any of the*

"'*Banks organized under the authority of the State where such* "'*association is located*'. The enabling Act of the State contains "no such limitation. The Banks of the State are taxed *upon their* "*capital*, and although the Act provides that the tax on the shares "of the National Banks shall not exceed the par value, yet, inas- "much as the *capital* of the State Banks *may consist of the bonds of* "*The United States, which are exempt from State taxation*, it is "easy to see that this tax on the capital is not an equivalent for a "tax on the shares of the stockholders." (Page 581, Law page 233).

The other points argued and decided were: (1) a denial, by plaintiff in error, that the State possessed power to authorize the taxation of National Bank shares, which contention was held bad, as based upon a misapprehension of the effect of the Act. (Pages 582-583, Law Pages 233-234; (2) a holding that the tax authorized by the Act was not upon the U. S. bonds, but on the National Bank franchises and privileges, (Page 583-585, Law Pages 234-235); (3) a holding that Congress had not conferred such authority on the States, but had only removed or waived a restriction on the State's authority to tax, (Page 585, Law Page 235); and (4) a holding that the *whole interest* of the shareholder in his shares of National or State Bank stock was taxable, without deducting the value thereof derived from investments of the Bank capital in U. S. Bonds, the Act having differentiated the shares of the stockholder from the capital of the Bank.

As to National Bank shares, this differentiation was effected by the *main provision*, contained in the first part of Section 41, authorizing State taxation of such National Bank shares, when considered in the light of other sections of the Act relating to National Bank shares; while the differentiation as to State Bank shares was effected by the *proviso or second limiting clause* in said Section, which proviso was quoted by this Court in the part of the opinion in *Van Allen v. Assessors*, heretofore set out, (Pages 585-588; Law Pages 235-236); but no reference whatever is made in the decision of the *Van Allen case*, to the phrase *'other moneyed capital'*, as , in any manner, affecting the decision of that case.

It is true, that Congress in effect authorized the taxation of the value of the shares of stock derived from the investment of the Bank capital in U. S. Securities, *as to both National and State Banks;* and had further required that the State *must tax* the shares of stock of its own corporations, in the manner prescribed, if it desired to avail itself of the *permission given by Congress for the State to tax National Bank shares.*

But all of this was done, either by the main provision, or by the proviso of Section 41, respectively relating to the taxation of the shares of stock in the different kinds of banks. The proviso, authorizing and requiring the taxation of the shares of State banks is the part of Section 41 which was repealed by the Act of 1868, previously mentioned, and *Van Allen vs. Assessors* is not an authority to sustain the taxation of State bank shares of stock, as provided in said proviso, under the subsequent Act of 1868, nor under Section 5219 of the Revised Statutes of the United States.

In the next case, *People v. Commissioners*, 71 U. S. (4 Wall) 244, 18 Law 344, decided in 1866, opinion by MR. JUSTICE NELSON, which arose under the Act of 1864 four questions were raised and disposed of, under the National Banking Act of 1864. These questions were:

(1) A claim that the shares of National Bank stock were improperly taxed at their full par value, without deducting that part of the value of the shares derived from U. S. Bonds purchased with the capital of the Bank. The holding was that the point had been adversely settled in *Van Allen v. Assessors, supra.* (Pages 255 256, Law Page 349.

(2) The same point was made as to the taxation of the full value of the shares of stock of the State Bank, without deduction of the value imparted thereto by U. S. Bonds held by the Bank. This also was held to have been disposed of by *Van Allen v. Assessors, supra.* (Pages 258-259, Law Page 350.)

(3) The deduction of U. S. Bonds from the *property of individuals*, while refusing the same deduction from the value of National Bank shares, was claimed to be in violation of the limiting clause concerning '*other moneyed capital, etc.*' This claim was held to be not well founded. The opinion said:

"The answer is, that upon a true construction of this clause of "the act, the meaning and intent of the law-makers were, that the "rate of taxation of the shares should be the same or not greater "than upon OTHER MONEYED CAPILAL WHICH IS SUBJECT OR LIA-"BLE TO TAXATION. That is, no greater proportion or percentage "of tax in the valuation of the shares should be levied than upon "other *moneyed* TAXABLE *capital in the hands of the citizens.*" (Page 256, Law Page 349).

Also: "The objection is a singular one. At the time Con-"gress enacted this rule as a limitation against discrimination, it "*was well known to that body that these securities in the hands* "*of the citizens were exempt from taxation.* It had been so held "by this court, and, for abundant caution, had passed into law." (Pages 256-257; Law Page 349.)

Also: "*The argument* founded on the objection, if it proves "anything, *proves that these securities should have been taxed in* "*the hands of individuals* to equalize the taxation, and therefore "there was error in the deduction. *This we do not suppose is* "*claimed.* But if this is not the result of the argument, then, the "other conclusion from it is, that Congress required that the com- "missioners SHOULD DEDUCT THE SECURITIES, AND, AT THE SAME "TIME INTENDED THE DEDUCTION, IF MADE SHOULD OPERATE AS "A VIOLATION OF THE RATE OF THE TAX PRESCRIBED. We dissent "from both conclusions, and think a sound construction of the "clause, and one consistent with its words and intent, is also con- "sistent with all the Acts of Congress on the subject." (Page 257, Law Pages 349-350.)

(4) The fourth objection was, that in taxing the capital and surplus profits of *Insurance Companies*, United States securities owned by the Companies were deducted, in violation of the limiting clause concerning '*other moneyed capital.* The opinion said:

"These institutions are not within the words or the contempla- "tion of Congress; but even if they were, *the answer we have al-* "*ready given* to the deduction of these securities in the assessment "of the property of individual citizens is *equally applicable to* "them". (Pages 257-258, Law Page 350.)

It will be observed that the freedom from State taxation of U. S. Securities is referred to as an *exemption*, from taxation, the Acts of Congress alluded to having been subsequently embodied in Rev. St. U. S. (1878), Section 3701, the Acts incorporated therein being set forth in the annotations following said Section.

But it was previously settled and re-affirmed in *Pollock v. Farmer's Loan & Trust Co.*, 157 U. S. 537, 39 Law 763, opinion by MR. CHIEF JUSTICE FULLER, quoted in *Plummer v. Coler*, 178 U. S. 115, 44 Law 998, opinion by MR. JUSTICE SHIRAS, cited in our original brief, (Brief Page 32), that this freedom of U. S. Securities from State taxation is a true *immunity*, arising from a *lack of power to tax*, on the part of the State, under the U. S. Constitution. This rule has been steadily adhered to by this Court since the '*Pollock*' *case*. It is very clearly stated in *Owensboro National Bank v. Owensboro*, 173 U. S. 668, 43 Law 852, opinion by MR. JUSTICE WHITE, and an extract therefrom on this point is quoted in our original brief. (Brief page 28.)

In *People v. Commissioners*, cited *supra*, a distinction is clearly drawn between property TAXABLE by the State, and that NON-TAXABLE by the State; and it is decided that U. S. Bonds in the hands of individuals, are *not taxable as 'other moneyed capital'*. In

other words, the phrase '*other moneyed capital*' which the State is required to tax, does not include *non-taxable* U. S. Bonds in the hands of individuals or insurance companies and this phrase, '*other moneyed capital*' is not a waiver, by Congress, of the immunity from State taxation of such U. S. Bonds in the hands of individual citizens or Insurance Companies, nor a permission for the State to tax such U. S. Bonds, direct or indirectly.

The case of *Lionberger v. Rouse*, 76 U. S. (9 Wall) 468, 19 Law 721, opinion by MR. JUSTICE DAVIS, was decided in 1870, but arose under the Act of 1864, prior to the Amendatory Act of 1868, the tax objected to having been assessed in the year 1867. The early part of the opinion refers to both the first limiting clause of Section 41, concerning '*other moneyed capital*', as well as to the proviso or second limiting clause relating to the taxation of State Bank shares of stock. (Page 473, Law Page 734). The complaint was that the State banks were taxed at a lower rate than the shares of stock of National banks were taxed. The decision was, that under the proviso or second limiting clause of Section 41, relating to the taxation of State bank shares of stock at a rate of taxation equivalent to the taxation of National bank shares of stock, no more was required of the State than "that it should, *as far as it had the capacity*, tax in like manner the shares of banks of issue of its own creation" (Page 476, Law Page 725.) But under the clause of the U. S. Constitution, relating to the non-impairment of the obligation of a contract, the State was without power to increase the tax on the two State banks, because of this legislative contract with the State.

It was in this condition of the statutes, and of the decisions of this Court, that the Act of 1868 was adopted.

AMENDATORY ACT OF 1868, NOW REV. ST. U. S. (1878), SECTION 5219: In the Act of Congress, approved Feb. 10th, 1868, (15 St. at L. 34, Ch. 7,) Section 41 of the Act of 1864 was re-written. The new act retained, with no substantial change, the *main provision* authorizing taxation, by the State, of the shares of Stock of National Banks, the assessment of the shares of non-resident owners to be made in the city or town where the Bank is located; re-enacted the *limiting clause* "THAT THE TAXATION SHALL "NOT BE AT A GREATER RATE THAN IS ASSESSED UPON OTHER "MONEYED CAPITAL IN THE HANDS OF INDIVIDUAL CITIZENS OF "SUCH STATE"; but *repealed* the proviso or second limiting clause requiring a rate of taxation of the shares of State bank stock equivalent to, or greater than, the rate of taxation assessed upon National bank shares of stock. The re-enactment appears now as Rev. Stat. U. S. Sec. 5219.

OTHER MONEYED CAPITAL: The leading case, concerning the meaning of this phrase, is *Mercantile National Bank v. New York City*, 121 U. S. 162, 30 Law 895, opinion by MR. JUSTICE MATTHEWS, where different specified classes of property were exempted from taxation, or had not been subjected to taxation, by the State of New York, all of which was claimed to be in violation of the '*other moneyed capital*' limiting clause of said Section 5219.

In reviewing this *Mercantile Nat. Bank* case, it must be remembered that it was decided upon consideration of the repeal, by the Act of 1868, of the proviso or second limiting clause contained in Section 41 of the Act of 1864, concerning the taxation of the shares of stock of State Banks. This change of the law is expressly referred to in this opinion, and the part of the opinion, so stating, has been heretofore quoted in this brief, *supra*.

This case reviews *Van Allen vs. Assessors, People vs. Commissioners, Lionberger vs. Rouse*, cited *supra*, and all cases on that subject decided by this Court, prior to the *Mercantile National Bank* case. It is therefore unnecessary to refer to such intermediate cases, except as commented on in that opinion.

The *Mercantile National Bank* opinion shows that this phrase must be considered in relation to two entirely distinct classes of property, viz:

1. Property *which is not subject to taxation* by the State.
2. Property *which is subject to taxation* by the State

1. PROPERTY NOT SUBJECT TO TAXATION BY THE STATE. The opinion in the *Mercantile National Bank* case stated, concerning the decision in *People v. Commissioners*, that a deduction of U. S. Bonds, from the assessment of property owned respectively by individuals and insurance companies, was there held to be authorized although such deduction was not permitted in the assessment of National Bank shares, under the act of 1864, so far as the value of said shares were derived from U. S. Bonds owned by the National Bank, and the latter opinion quoted from the first opinion, part of which has been previously set out in this brief.

The *Mercantile National Bank* opinion thereon said:

"The court then, (in *People v. Commissioners*), proceeded "to show that the exclusion, as the subject of taxation, of govern- "ment securities held by individuals, from their *moneyed capital*, " was by authority of the United States, and hence it would be a "contradiction to infer that Congress meant to include govern- "ment securities as a part of that *moneyed capital* which is required "to be taxed by the States at a rate equal to that imposed by the

"latter upon the shares held by individuals of National Bank "stock". (Pages 149-150, Law Page 899).

The opinion in the *Mercantile National Bank* case again referred to the opinions in *Van Allen v. Assessors* and *People v. Commissioners,* and concerning the *'Van Allen'* case, said;

"In the valuation of the capital of State Banks for this taxation, "*non- taxable securities of the United States were necessarily ex-* "*cluded*", * although "the effect of this was of course to discrim- "inate to a very important extent in favor of investments in State "Banks". (Page 152, Law Page 900). The opinion also said, "further referring to *People v. Commissioners*: "It was held that "the exemption, under State authority of United States securi- "ties, *which it was not lawful for the State to tax,* could not be "considered an unwarranted exemption in that case". (Pages 152-153; Pages 900-901).

The *Mercantile National Bank* opinion further referred to the non-taxation by the State, of Municipal Bonds of the City of New York. Such bonds were issued under authority of the State, and were declared to be a means of carrying on the State government, *non-taxable* by the United States, and said:

"Such securities undoubtedly represent *'moneyed capital'*, but "as from their nature they are *not ordinarily the subjects of tax-* "*ation,* they are not within the reason of the rule established by "Congress for the taxation of National Bank shares." Page 161-162, Law Page 904).

The *Mercantile National Bank* opinion also referred to the non-taxation, by the State, of corporate shares of stock, issued by corporations of other States, and held by individuals in the State of New York. The Courts of New York had decided that such shares had no *situs* for taxation in the State of New York. The opinion said:

"The objection would be equally good if made to the non-tax "ation of *real estate* owned by citizens of New York, *but not with-* "*in its limits.* Clearly the property to be taxed under the rule pre- "scribed for the taxation of National Bank shares, *must be prop-* "*erty which,* according to the law of the State, *is the subject of* "*taxation within its jurisdiction*". (Page 162, Law Page 904).

(2). PROPERTY WHICH IS SUBJECT TO TAXATION BY THE STATE

The subjects, within the power of the State to tax, which are considered in the *Mercantile National Bank* opinion, can be arranged in two groups of which some are, and others are not, *other moneyed capital,* within the meaning of Section 5219, as follows:

Moneyed capital which is not considered other moneyed capital within the meaning of Section 5219.

(A.) Capital employed in certain businesses which do not come into competition with the business of National Banks. The capital so employed is *'not other moneyed capital'* within the meaning of Section 5219. This includes trading, manufacturing, mining, railroad and industrial enterprises, and a number of miscellaneous businesses. (Opinion Pages 154 to 156, Law Pages 901-902).

(B.) Capital employed by corporations, as they are not 'individual citizens of such State', and their capital is *'not other moneyed capital'* within the meaning of Section 5219. (Opinion Page 156, Law Page 902). The opinion stated that corporations of the description above referred to in Paragraph 'A', "may have "a large part of its capital invested in securities payable in money "and so may be the owners of *moneyed capital;* but as we have al- "ready seen, the shares of stock in such companies held by indi- "viduals are *not moneyed capital*". (Page 156, Law Page 902).

(C.) Capital invested in real or personal property, as destinguished from *'moneyed capital* to be invested in securities by way of loan, discount, etc., to be again reduced to money, and again reinvested, etc. (Opinion Page 157, Law Page 902).

(D.) Capital which, for sound and adequate reasons of State policy, and withing reasonable limits, has been exempted from taxation by the State, (Opinion Page 149), although it would otherwise be *'moneyed capital'* within the meaning of Section 5219.

This includes an exemption of 'all mortgages, judgments, 'recognizances, and money owing upon articles of agreement for 'the sale of real estate', as adjudged in *Hepburn v. School Directors,* 90 U. S. (3 Wall) 480, 23 Law 112. opinion by MR. CHIEF JUSTICE WAITE; *Mercantile National Bank* opinion, Page 150, Law Page 900).

It also includes an exemption of interest-bearing bonds issued by a municipal corporation, the City of Nashville, which bonds were in the hand of individuals, as adjudged in *Adams v. Nashville,* 95 U. S. 16, 24 Law 369, opinion by MR. JUSTICE HUNT. The *'Adams'* case gives as proper exemption, the ordinary homestead in real estate, and numerous items of personal property. (*Mercantile National Bank* opinion, Page 151, Law Page 900).

It also includes deposits in Savings Banks, not formed for pecuniary profit, but organized as those of the State of New York which were considered in the *Mercantile National Bank* case, where the object of the law was to promote the accumulation of small savings belonging to the industrious and thrifty. These deposits

were *moneyed capital* in the hands of individuals, but when thus exempted by State law they were *not 'other moneyed capital'* within the meaning of Section 5219. (Page 160-161, Law Page 903-904).

The limit of State exemptions of *moneyed capital*, so as not to be in violation of Section 5219, is thus stated: "The only limita-" tions, upon deliberate reflection, we now think it necessary to " add, is that that these exemptions should be founded upon just " reason, and not operate as unfriendly discrimination against in-" vestments in National Bank shares". (Opinion Page 161, Law Page 903-904).

This limitation was transcended by the State of Pennsylvania under the facts stated in *Boyer v. Boyer*, 113 U. S. 689, 28 Law 1089, opinion by *Mr. Justice Harlan*, which is referred to in the *Mercantile National Bank* case. (Opinion Page 147, Law Page 898).

Moneyed capital which is considered 'other moneyed capital' within the meaning of Section 5219.

The *Mercantile National Bank* opinion stated, that New York Loan and Trust Companies were assessed, for *local purposes*, upon the actual value of their capital stock, less the value of their real estate, and *less their non-taxable securities, including U. S. Bonds.* In addition, there was imposed upon such Companies a franchise tax, in the nature of an income tax, *payable to the State.* The opinion said:

"They receive money on deposit, it is true, and invest it in " loans, and so deal, therefore, in money, and securities for money, " in such a way as properly to bring the shares of stock held by " individuals therein, within the definition of *'moneyed capital in the hands of individuals'*, as used in the Act of Congress."

Also:—"It is evident, we think, that taxation in this mode is, " at least, *equal to that upon the shares of individual stockholders,* " for if the same property was held for the same uses and taxed by " the same rule, in the hands of individuals, *as moneyed capital*, it " would be subject to precisely the *same deductions*, in addition " to which, the individual would be entitled to make a *further de-" duction* of any debts he might owe. Upon these grounds, therefore " we are of opinion that this mode of taxing Trust Companies does " not create the inequality which the appellant alleges." (Page 158-159; Law Pages 902-903).

In the *Mercantile National Bank* case, aside from the deposits received and the investments thereof made by way of loans and discounts, by the New York Loan & Trust Companies, there was

not, in the record before the Court, any specific subject-matter of taxation, which was adjudged to be *'other moneyed capital'* within the meaning of Section 5219.

There is a sufficiently full, and accurate general definition, for the purposes of *'Mercantile National Bank'* case, as to what constitutes a *banking business,* from which the deduction is drawn and clearly laid down, that *'moneyed capital'*, employed in the banking business of a State Bank, does come into competition with the banking business of a National Bank, and it was this *competitive moneyed capital* used by the State Bank, which Congress intended to reach, direct or through the shares of stock of said State Bank, by its enactment concerning *'other moneyed capital'*. But whether any particular investment, or class of investments other than the Loan and Trust companies capital and business, was included in the term *'moneyed capital'*, within the meaning of Section 5219, or was used in the banking business, within the meaning of that opinion, was not presented by the record in that case, and was therefore, not decided. The *Mercantile National Bank* opinion is almost wholly negative determining what is *not 'other moneyed capital'* within the meaning of Section 5219, because of the nature of the matter presented for consideration by the record.

It is settled law that the principles announced by this Court must be considered in the light of the facts before the Court in the particular case. "It is a general rule, expressly recognized by the "Court in *Sturges v. Crowninshield,* that the positive authority "of a decision is *co-extensive only with the facts* on which it is "made", as stated by MR. CHIEF JUSTICE MARSHALL in *Ogden v. Saunders,* 25 U. S. (12 Wheat) 333, 6 Law 647. Re-assertions of the foregoing rule, have been made by this court, over and over again.

As we understand the *Mercantile National Bank* case, the only subjects of taxation which are considered *'other moneyed capital'* of a State Bank, within the meaning of Section 5219, is the taxable capital of the State Bank, or the beneficial interest or ownership, (through the shares of stock of such State Bank, which shares are in the hands of individual citizens), in or of the *taxable* capital of said State Bank, or the *taxable* investments thereof; and that the ownership of, or the benefical interest or ownership, through the shares of stock, in or of *non-taxable* securities of the United States, is not *'moneyed capital'* within the meaning of Section 5219.

CASES SUBSEQUENT TO THE MERCANTILE NATIONAL BANK CASE: We fail to discover any case decided by this Court, subsequent to the *Mercantile National Bank* case, which tends in any manner to establish that the words *'other moneyed capital'* in Section

5219, confer upon the State, the power to tax *non-taxable* objects, such as Securities of the United States, or that this phrase has ever been adjudged to give to the State the permissive right of taxing United States securities, directly or indirectly.

All subsequent cases decided by this Court, that we have found relate to the taxation, as *'other moneyed capital'*, of objects or subjects matter, which were undoubtedly within the power of the State to tax, but were exempted from taxation under State laws, or were not taxed at all, or were taxed at a less rate, under State laws.

The principal of these cases are *National Newark Banking Co. v. City of Newark*, 121 U. S. 163, 30 Law 904, opinion by MR. JUSTICE MATTHEWS; *Davenport National Bank v. Davenport*, 123 U. S. 83, 31 Law 94, opinion by MR. JUSTICE MILLER; *Bank of Redemption v. Boston*, 125 U. S. 60, 31 Law 689, opinion by MR. JUSTICE MATTHEWS: *First National Bank (Garnet) v. Ayers*, 160 U. S. 664, 40 Law 574, opinion by MR. JUSTICE PECKHAM; *Aberdeen Bank v. Chehlis County*, 166 U. S. 443, 41 Law 1072, opinion by MR. JUSTICE SHIRAS; *National Bank of Commerce, (Seattle) v. City of Seattle*, 166 U. S. 463, 41 Law 1079, opinion by MR. JUSTICE SHIRAS; *First National Bank of (Wellington) v. Chapman*, 173 U. S. 211, 43 Law 671, opinion by MR. JUSTICE PECKHAM; *Jenkins v. Neff*, 186 U. S. 231, 46 Law 1141, opinion by MR. JUSTICE BREWER; *San Francisco v. Dodge*, 197 U. S. 78, 49 Law 672, opinion by MR. JUSTICE WHITE.

The case of *Jenkins v. Neff*, 186 U. S. 231, 46 Law 1141, cited *supra*, involved the rate of taxation of New York Loan & Trust Companies, under the *'other moneyed capital'* limitation of Section 5219, as compared with the rate of taxation assessed upon the shares of stock of National Banks. It contains an extract from the opinion of the State Court, written by MR. JUSTICE WOODWARD, which, in general, this Court approved. The opinion by *Woodward, J.*, clearly keeps in view the distinction between capital invested in *taxable property*, and that invested in property which is *immune or exempt* from taxation.

It should be noted that in *San Francisco v. Dodge*, 197 U. S. 78, 49 Law 672, cited *supra*, and the cases therein cited, it is held that it is no longer necessary for the State to tax the shares of stock of a State Bank, but the State tax may be imposed upon the franchises, good will and capital, or the investments of the capital of the State Bank, so far as subject to taxation by the State or upon the shares of stock, so far as subject to taxation by the State.

CONCLUSIONS DEDUCIBLE FROM THE ACTS OF CONGRESS AND THE DECISIONS OF THIS COURT: The conclusions which we claim are to be deduced from the Acts of Congress and the decisions of this Court, previously referred to, are as follows:

Section 41 of the Act of 1864:

(A.) The right of the State to tax the *full value* of the shares of stock of *National Banks*, without regard to that in which the capital of the Bank is invested, is derived from the MAIN CLAUSE of Section 41 of the Act of 1864, substantially re-enacted in the Act of 1868, which now appears as Rev. St. U. S., Section 5219, as determined by this Court in *Van Allen v. Assessors*, and subsequent cases decided under said Acts and Statute. On this point the authority of the *'Van Allen'* case remains in full force without change.

(B.) The right and obligation of the State to tax the *full value* of the shares of stock of *State Banks*, without regard to that in which the capital of the Bank was invested, was derived from the PROVISO or second limiting clause of Section 41 of the Act of 1864, as determined by this Court in *Van Allen v. Assessors*, and the subsequent cases decided under the same act. But this proviso was repealed and not re-enacted in 1868, and *Van Allen v. Assessors* and such subsequent cases, based upon said proviso, are no longer law, nor are they authority, *as to State Banks*, in construcing the Act of 1868, (Section 5219).

(C.) The Act of 1868 having been adopted after the proviso or second limiting clause, concerning the taxation of the shares of stock of State Bank had been construed and applied by this Court, the presumption is that the change of statute was intended to make a change in the law; that the policy of Congress, as to shares of stock of State Banks, evidenced by the Act of 1864, was itself changed; and that the Act of 1868, enacted a different policy, as to the shares of stock of State Banks, from the policy declared, on the same subject, by the Act of 1864. The proviso would have been substantially re-enacted, if the same policy was intended to be retained; but it was repealed, instead of being re-enacted.

It is impossible to believe that Congress intended to maintain the policy as to the taxation of shares of stock of State Banks, declared in the proviso of said Section 41, and yet repealed the clear declaration of said policy contained in said proviso, after its meaning and construction had been established and made unquestionable by the decisions of this Court, thus leaving its intention to continue the same policy to be deduced from such a vague and indefinite phrase as *'other moneyed capital'*. That this phrase is ambiguous

indefinite, vague and uncertain, is clearly shown by the opinion rendered in the Mercantile National Bank case, *supra.* The continuance of the same policy, on the part of Congress, is rendered more improbable, because this particular phrase was not considered or relied on by this Court, in *Van Allen v. Assessors, supra,* in adjndging that the State had the right to assess the *full value* of the shares of stock of *State* Banks, without regard to that in which the capital of the State Bank was invested.

The proposition that a change of law and policy is presumed from a change of statute, is stated and authorities thereon cited in 1 Fed. Statutes Annotated, (1903 edition). Pages CIX-CXX, Subdiv. 32.

The Clause concerning 'other moneyed capital etc.,

(D.) In no case decided by this Court, has it been held that the phrase *'other moneyed capital'* included any subject-matter of taxation IMMUNE from taxation under the U. S. Constitution, nor any subject-matter of taxation PROPERLY EXEMPTED from taxation under the Statutes of the United States, or the Statutes of any State. On the other hand, the decisions of this Court have all been the other way. Whenever and wherever United States Bonds or Securities have been considered, in connection with the phrase *'other moneyed capital',* the statement has been made that they were *non-taxable,* or were *necessarily deducted, necessarily excluded* or other equivalent phraseology. And the same rule has been applied to subjects-matter of taxation *properly exempted* by the State.

(E.) The capital of a Bank, when, and while invested in U. S. Securities, is thereby withdrawn from all *active operations of banking,* such as loaning, discounting, selling and effecting exchanges, etc., and is in reality and in its effect a loan of that amount to the U. S. Government, which loan continues so long as the Bank remains a creditor of the Government, as the owner of such U. S. Bonds or other Securities. It is only the capital which is not invested in U. S. Securities, which is employed in the *active banking operations.*

In so far as the object of Congress was to secure like or greater taxation of the capital or shares of stock of the State Bank, *actually used in active banking operations,* or the beneficial ownership of said State Bank capital through the shares of stock of said State Bank, compared with the rate of taxation imposed by the State upon the shares of stock in National Banks, this result is fully attained by subjecting to State taxation all of the State Bank capital *actually used in active banking operations,* and actually

competitive with the National banking business, exclusive of U. S. Securities, or the beneficial ownership through the shares of stock of the State Bank capital, thus actively employed, without including the value thereof derived from the investment of other capital of the State Bank in said U. S. Securities. The difference in the valuation of National Bank stock thus subjected to taxation, is a payment made by the National Bank, or a burden imposed on the National Bank, under the authority of Congress, in consideration for the special privileges and benefits conferred by Congress upon National Banks, which are thus submitted, to a limited extent, to that taxation, by the State, by and under the affirmative permission of Congress. State Banks have no such right or privilege derived from Congress.

(F.) Under the Act of 1868, or under Section 5219, the State tax may be imposed either upon the franchises, goodwill, and capital of the *State Bank*, or upon the shares of stock of said Bank, in the hands of stockholders, without violating said Act or Statute. But if the tax is imposed upon the franchises, goodwill and capital of the State Bank, the *non-taxable U. S. Bonds must be deducted*, and only the property and rights *taxable* by the State,—that is the franchises, goodwill and *taxable* capital or the *taxable* investments of the capital of the State Bank,—are required to be assessed, so that the method of assessment and the rate per cent or specific rate of taxation does not discriminate against the National Bank shares of stock. An equal tax upon State Bank shares of stock, exclusive of the value imparted thereto by U. S. Bonds owned by the Bank, is the equivalent of such taxation of the State Bank, taxable franchises, goodwill and capital or its investments, less *non-taxable* U. S. Securities, and is all that is now required.

THE REMAINING ELEMENT OF THE LIMITING CLAUSE OF SECTION 5219:

It will be readily observed that the limiting clause of the Act of 1868, now Rev. St. U. S. (1878), Section 5219, consists of two distinct parts or elements:

1: *The rate of taxation.*

2: The *property* designated as *'other moneyed capital'*.

We have already discussed the phrase, *'other moneyed capital'*. It is our contention that the provision on the subject of the *rate of taxation* has no bearing upon the question of an alleged permissive authority given by Congress to the State to tax the beneficial interest in U. S. Securities, owned by a State Bank, held by the stockholders through the shares of stock of the Bank, and will therefore dispose of this contention as briefly as possible.

It will be seen, at once, that, if such part of the value of the shares of stock of a State Bank as is derived from the investment of any of the capital of the Bank in Federal Securities, is *immune*, to that extent, under the U. S. Constitution, from taxation by the State, there being no Act of Congress permitting the taxation of such value, then such value could not be taxed by the State, at any rate per cent, or by any specific tax, or under any method of valuation or assessment, the State might adopt.

1. THE RATE OF TAXATION INCLUDES:

(A.) The rate per cent upon the assessed valuation, or the rate of specific taxation, as the tax may be *ad valorem* or specific.

(B.) The true real value of the shares to be assessed *ad valorem* or the number and value of the shares subject to specific taxation, less any deductions allowed therefrom, as exemptions, offsets of debts, or otherwise.

(C.) The amount of the tax, so ascertained, less any deductions or offsets allowed from said tax.

Alleged discriminations, in each of these respects, except possibly that part of the one marked, (C), deductions or offsets from the amount of the tax so ascertained by computation, have been before this Court repeatedly, and where a real discrimination against National Bank shares was established, it was held to be a violation of the rate of taxation required by Section 5219.

While not in connection with a National Bank, there is a case, recently decided by this Court entitled *New York ex rel., v. Tax Commissioners, (N. Y.)*, 199 U. S. 45-46, 50 Law 78-79, opinion by MR. JUSTICE BREWER, which cited *Herrwagen v. Crosstown St. Ry. Co.*, 179 N. Y., 99, where the deduction was made from the tax levied, and not from the assessed valuation upon or against which the levy was made.

An equal rate of taxation upon unequal valuations has been frequently condemned by this Court. Several cases deciding that point are cited in the *Mercantile National Bank* case, 121 U. S. 15, 30 Law 900, including *People v. Weaver*, 100 U. S. 539, 25 Law 705.

It is manifest, as a matter of common arithmetical computation, that the amount of an *ad valorem* tax assessed upon shares of stock is composed of two factors, viz: the rate per cent of the tax multiplied by the valuation of the shares to be taxed; or in case of a specific tax, the rate of specific taxation multiplied by the number of the shares subjected to said tax.

In either case, if the true or real value of the shares is established, either by proof or presumption, the proportion which the tax bears to the established value can be determined; or the tax, in either case, can be reduced to a percentage basis, and then it can be easily determined whether there is a greater rate of taxation of the shares of stock of a National Bank than upon '*other moneyed capital*' subject to taxation by the State.

In *Bell's Gap R. R. v. Pennsylvania*, 134 U. S. 239, 33 Law 895, MR. JUSTICE BRADLEY, speaking for the Court said: "The presumption is that corporate securities are worth their face value." It would seem that the same presumption must obtain as to the shares of stock of Banks organized under the National Banking Act, or under the laws of Iowa, since such Banks, organized under either law, must have the capital subscribed actually paid in, in lawful money, must make periodical sworn reports, are subject to periodical inspections, must make good any impairment of capital, and are liable to be placed in the hands of a receiver, if the impaired capital is not restored. And the same reason and rule would apply to all Banks organized under similar laws of other States.

In case this presumption does not prevail, it is, then certainly incumbent upon any one claiming a discrimination, to furnish the proof of values necessary to establish the same, and it may be safely assumed, that this Court would have to be placed in possession of such proof, before it could determine whether or not there had been a material discrimination against the shares of stock of National Banks.

There may be a difference in the method of making the assessment, such as taxation of the *property* of State corporations, and of the *shares of stock* of National Banks, or a specific tax on State Bank shares and an *ad valorem*, assessment of National Bank shares, or *vice versa*. But it is settled law that Section 5219 does "not require the States, in taxing their own corporations, to con-"form to the system of taxing National Banks upon the shares "of their stock in the hands of their owners". *San Francisco National Bank v. Dodge*, 197 U. S. 78, 49 Law 674, (opinion by MR JUSTICE WHITE.)

In the same case, it is also held, that the prohibition or limitation of Section 5219, avoids any method of assessment or taxation which discriminates against National Banks, as well as any system which in its practical execution produces an actual and material discrimination against National Banks, (Pages 78-79, Law Page 674).

In all such cases of discrimination, there is established no assessment at all, or a lower assessment of other property, proportionate to its real value, compared with the assessment made upon the shares of stock of National Banks, or no tax, or a lower percentage of tax, levied on said property than is levied upon shares of stock of National Banks, or both. But in making the comparison the standard is invariably the rate of State taxation upon *property subject to taxation* by the State, in contrast with the rate of State taxation upon or against shares of stock of National Banks.

THE RULE OF CONSTRUCTION APPLICABLE TO THE ACT OF 1868 AND SECTION 5219 OF THE NATIONAL BANKING ACT:

The State has NO POWER, directly or indirectly, to tax Federal Securities under the U. S. Constitution. Congress, by affirmative permissive legislation, may authorize such taxation by the State.

In the *'Van Allen'* (3 Wall) case, it was claimed that Congress did not possess the power to confer upon the State an authority expressly delegated to Congress by the Constitution. The opinion said: "But as it respects a subject matter over which Congress "and the States may exercise a *concurrent* power, but from the "exercise of which Congress, by reason of its paramount authority, "may exclude the States, there is no doubt Congress may with-"hold the exercise of that authority, and leave the States free to act." (Page 585, Law Page 235).

The permission for the State to tax this immune property, is not, therefore, technically a grant of power by a paramount Sovereign to a grantee or beneficiary, but it is in the nature of such a grant, and should be governed by the same rule, viz: that all such grants by a paramount Sovereignty, representing the public or the people as a whole, should be strictly construed against the grantee or beneficiary, and such grant will not be implied but must must be granted in express terms or by necessary implications from the terms expressed, and, in case of doubt the grant will be denied.

It is undeniable that before the Act of 1864 was passed by Congress, the State had *no power* to tax immune objects; after the Act was passed the State *did have such power*, to the extent provided in the Act, and the same construction should be given to the Act as if it were a grant of power by the paramount Sovereignty to the State as a beneficiary.

Concerning the sovereign grant of powers to a corporation, in *Jenkins v. Neff*, 186 U. S. 234, 46 Law 1142, opinion by MR. JUSTICE BREWER, this Court has said: "A grant of corporate life or

"corporate power is not made by implication, and the same rule "obtains in respect to the matter of recognition. If the language "of the legislature is satisfied, has full scope and effect, without "reading into it either a grant or a recognition of corporate life "or power, neither will be implied,"

In the recent case of *New York ex rel. v. Tax Commissioners*, 199 U. S. 36-37, 50 Law 75, opinion by MR. JUSTICE BREWER, after stating that an exemption from taxation under legislative authority "must be plainly and unmistakably granted; it cannot "exist by implication only; a doubt is fatal to the claim," the opinion then proceeded to say: "This rule is akin to, if not part "of, the broad proposition, now universally accepted, that in grants "from the public nothing passes by implication."

This rule while limited in the cited case, of *Jenkins v. Neff* to a grant of corporate life or power, is a general rule applicable to a grant of beneficial rights or property by a paramount Sovereignty. It is frequently expressed as a strict construction against the grantee or beneficiary and in favor of the paramount Sovereignty, and the rule has been established for the benefit of the general public, who are represented by the paramount Sovereignty. The rule and numerous authorities applying it are cited in 1 Federal Statutes Annotated, (1903 ed), Pages CVII, CVIII and CIX, subdiv. (h).

Aside from the uncertainty of the meaning of the phrase *'other moneyed capital'*, there are special reasons why the right of the State to tax subjects-matter, IMMUNE from taxation under the United States Constitution, should receive the strict construction above referred to in their application to the Act of 1868, now Section 5219.

It will be readily observed that by the language of the statute and under the decisions of this Court construing the statute, there is a well fixed limitation as to the power of the State to tax the shares of stock of National Banks. This limitation is that the tax on the National Bank shares shall not be greater than the tax imposed by the State upon *'other moneyed capital'*, whatever meaning that phrase is adjudged to have. The limitation however, is clear and emphatic.

But if the phrase, *'other moneyed capital'*, is held to include U. S. Securities in which the capital of the State Bank has been invested, or the beneficial ownership through the shares of stock of such U. S. Securities, it is manifest that an UNLIMITED POWER of taxation of such securities directly or indirectly, in the hands of the *State Banks* or beneficially owned through the shares of

stock by the shareholders of the State Banks, is given to the State.

There is no limitation imposed upon the taxing powers of the State over the capital or shares of stock of a State Bank, in the clause concerning *'other moneyed capital'*. It is true this is a limiting clause, but limiting *only* as to the rate of taxation, which may be imposed upon the shares of stock of National Banks, and it contains no limitation whatever as to the taxation which may be imposed upon State Banks.

There is nothing in that clause, that we can discover, that would in any manner prevent or prohibit the State from taxing a given rate, (for instance, 1 per cent) upon the par value of the shares of stock of both State and National Banks, and *then providing*, by way of illustration, that in case the State Bank owned any U. S. Bonds, that then the rate of taxation upon its aggregate valuation for taxation, or upon the part invested in U. S. Bonds should be two or three or any number of times greater, than the same tax imposed upon a State Bank which did not own any U. S. Securities. We do not believe that Congress intended to give to the State any such unlimited powers over State Banks, or the shares of stock thereof, where the capital or any part of the capital was invested in U. S. Securities.

The power to tax implies the power to destroy. It has been repeatedly held by this Court that the power to tax, unless controlled or limited by some Constitutional provision, implies the power to destroy. *Providence Bank vs. Billings*, 29 U. S. (4 Pet) 560, 7 Law 955; *Bank of Commerce v. New York*, 67 U. S. (2 Black) 630 631, 17 Law 541; *Fairbank v. U. S.*, 181 U. S. 291, 45 Law 866. It was by virtue of the use of this Federal Power of taxation that the circulation, as money of State Bank notes, was destroyed by the Federal tax imposed thereon. *Veazie Bank v. Fenno*, 75 U. S. (8 Wall) 533, 19 Law 482.

It is for this reason that United States property, franchises, instrumentalities, operations, securities, etc., are held to be IMMUNE from State taxation; and State property, franchises, instrumentalities, operations and securities are held to be IMMUNE from Federal taxation. *Plummer v. Coler*, 178 U. S. 118, 44 Law 1002;

Mercantile Bank v. New York, 121 U. S. 138, 20 Law 895;

Pollock v. Farmers Loan & Trust Co., 157 U. S. 429, 583, 39, Law 759, 820.

Owensboro National Bank v. Owensboro, 173 U. S. 699, 43 Law 852.

THE POLICY OF CONGRESS IS CONTROLLING, IN CONSTRUING SECTION 5219

In *Mercantile Nat. Bank v. New York City*, 121 U. S. 154, 30 Law 401, previously referred to, the opinion said: "The key "to the proper interpretation of the Act of Congress is its policy "and purpose."

But Section 5219 is but a part of the National Banking Act, and that Act itself was only a part of the gigantic fiscal or financial operations undertaken by Congress, wherein the Constitutional powers of Congress were stretched to the limit, such extensive financial plans having been made necessary by the Civil War, raging during the whole period of the enactment of the various Acts of Congress adopted for the purpose of carrying into effect the financial policy adopted for carrying on the War.

The primary object and policy of Congress in adopting these measures must control in so far as it may effect or conflict with the subordinate, although important part, of the fiscal plans of the Federal Legislative body, embodied in Section 5219, and in the prior Acts of Congress on the same subject.

We will therefore outline the measures of Congress, and state the primary controlling object and purpose of their passage, as affecting the construction and interpretation to be given to Section 5219.

THE FINANCIAL SITUATION EXISTING DURING THE WAR OF THE REBELLION: The financial situation which the Government of the United States had to meet by its measures, from 1861 to 1865, and subsequent thereto is best stated in the language of this Court, used in the majority opinion written by MR. JUSTICE STRONG, in *Knox vs. Lee-Legal Tender Cases* rendered in 1870, 79 U. S. (12 Wall) 540-541, 20 Law, Pages 308-309, as follows:

"We do not propose to dilate at length upon the circumstances "in which the country was placed, when Congress February 25th "1862 attempted to make treasury notes a legal tender. They are "of too recent occurrence to justify enlarged description. Suffice "it to say that a civil war was then raging which seriously threat- "ened the overthrow of the government and the destruction of the "Constitution itself. It demanded the equipment and support of "large armies and navies, *and the employment of money to an ex-* "*tent beyond the capacity of all ordinary sources of supply.* Mean- "while the public treasury was nearly empty, and the credit of the "government, if not stretched to its utmost tension, had become "nearly exhausted. *Moneyed institutions had advanced largely* "*of their means, and more could not be expected of them. They*

" *had been compelled to suspend specie payments.* Taxation was " inadequate to pay even the interest on the debt already incurred, " and it was impossible to await the income of additional taxes. " *The necessity was immediate and pressing.* The army was un- " paid. There was then due to the soldiers in the field nearly a " score of millions of dollars. The requisitions from the War and " Navy Departments for supplies exceeded fifty millions, and the " current expenditure was over one million per day. The entire " amount of coin in the country, including that in private hands, " as well as that in banking institutions, was insufficient to supply " the need of the government three months, had it all been poured " into the treasury. *Foreign credit we had none.* We say nothing " of the overhanging paralysis of trade, and of business generally " which threatened loss of confidence in the ability of the govern- " ment to maintain its continued existence, and therewith the com- " plete destruction of all remaining national credit."

"It was at such a time and in such circumstances the Congress " was called upon to devise means for maintaining the army and " navy, for securing the large supplies of money needed, and in- " deed, for the preservation of the government created by the Con- " stitution. It was at such a time and in such an emergency that " the legal tender acts were passed. Now, if it were certain that " nothing else would have supplied the absolute necessities of the " treasury, that nothing else would have enabled the government " to maintain its armies and navy, that nothing else would have " saved the government and the Constitution from destruction. " while the legal tender acts would, could any one be bold enough " to assert that Congress transgressed its powers? Or if these " enactments did work these results, can it be maintained now that " they were not for a legitimate end, or 'appropriate and adapted " to that end,' in the language of CHIEF JUSTICE MARSHALL? That " they did work such results is not to be doubted. Something " revived the drooping faith of the people; something brought " immediately to the Government's aid the resources of the nation, " and something enabled the successful prosecution of the war, " and the preservation of the national life. What was it, if not " the legal tender enactments?" (Pages 540-541, Law Pages 308-309)

CONGRESSIONAL FINANCIAL LEGISLATION FROM 1861 TO 1865: The financial legislation enacted by Congress, to meet and overcome the financial stringency and embarrassment which existed during the War of the Rebellion, is clearly and succinctly summarized, by this Court, in the opinion rendered by MR. CHIEF JUSTICE CHASE, in the case of *Veazie Bank v. Fenno*, 75 U. S. (8 Wall) 548, 19

Law 488, and as to certain phases of said legislation, it received a more full and extended consideration in the different opinions rendered by certain of the JUSTICES of this Court in the case of *Knox v. Lee-Legal Tender Cases*,- 79 U. S. (12 Wall) 405, 20 Law 308.

The principal Acts of Congress in chronological order relating to legal Tender or U. S. Notes. U. S. Treasury Notes, National Banks, the Taxation of the notes of State banks and of Municipal corporations intended to circulate as money or used in that way, Duties on Imports, the National Credit and Refunding of U. S. Bonds, were as follows:

1861: Act of July 17th-12St. at L., Ch. 5, P. 259. (R. S. U. S. Sec. 3589- *Treasury Notes*).

1862: Act of Feb. 12th-12 St. at L., Ch. 20, P. 338; (Duties on Imports and Treasury Notes). Act of Feb. 25th-12 S. at L., Ch. 33, P. 345 (*Legal Tender Notes*). Act of Mar. 17th-12 St. at L., Ch 45. P. 370, (*Legal Tender & Treasury Notes, Duties, on Imports*). Act of July 11th-12 St. at L., Ch. 142, P. 532 (*Legal Tender Notes & Duties on Imports*).

1863: Act of Feb. 25th-12 St. at L., Ch. 58, P. 665 (NATIONAL BANKS). Act of Mar. 3rd-12 St. at L., Ch. 73. P. 711.(*Treasury and Legal Tender Notes, Duties on Imports.*)

1864: Act of June 3rd-13 St. at L., Ch. 106, P. 99-100. (NATIONAL BANKS). Act of June 30th-13 St. at L., Ch. 172, P. 218, (*Treasury Notes and Duties on Imports*). Acts of June 30th 13 St. at L., Ch. 173. P. 251, 277.(*Tax on Banks*).

1865: Act of Mar. 3rd-13 St. at L., Ch. 78, P. 484. (*Tax on Bank circulation*).

1866: Act of July 13th-14 St, at L., Ch. 184, P. 146. (*Tax on Bank circulation*:)

1867: Act of Mar. 26th-15 St. at L., Ch. 8, P. 6. (*Tax on Notes paid out by National Banks*).

1868: Act of Feb. 10th-15 St. at L., Ch. 7. P. 34. (NATIONAL BANKS).

1869: Act of Mar. 18th-15 St. at L., Ch. 1, P. 1. (*Credit Strengthening Act*).

1870: Act of July 14th-16 St. at L., Ch. 256, P. 273(*Bond Refunding Act*).

These Acts, modified by amendments thereto, as they existed in 1878, are contained in Rev. St. U. S., (1878, in Title 39, *'Legal Tender'*, in Title 62, *'National Banks'*; in Rev. St. U. S. Sections

3412 and 3413, concerning Taxation of Notes used for circulation as money, when paid out by State or National Banks; in Section 3473, concerning Duties on Imports being payable in gold; in Section 3693, the Credit Strengthening Act; and in Sections 3695-3697, the Bond Refunding Act. In addition to the foregoing were the various Internal Revenue Acts, including Legacies and Succession duties, and the amendments thereto, Title 35, *'Internal Revenue'*.

The opinion in *Veazie Bank v. Fenno*, 75 U. S. (8 Wall) 537, 19 Law 488, by MR. CHIEF JUSTICE CHASE, stated that the State Banks suspended specie payments on December 31st, 1861, which necessitated a *new policy* on the part of the United States. The first part of the new policy was adopted by the Act of February 25th, 1862, (12 St. at L. Ch. 33 P. 345), wherein the issue of $150,000,000, of U. S. Notes was authorized, and the same were declared to be lawful money and a legal tender. This amount was subsequently increased to $450,000,000. (Pages 537-538, Law Page 484).

Another part of the new policy was the National Banking Acts which were adopted February 25th, 1863, June 3rd, 1864 and February 10th, 1868.

Under the Act of 1863, *the shares of stock of National Banks were not taxable by the State, and United States securities held by State Banks were not taxable, either directly against the State Banks, or indirectly, through the shares of stock in the hands of the shareholder.* .

Under the Act of 1864, the shares of stock of both National and State Banks were made taxable by the State, at their full value, including such part of their value as was deriveed from U. S. Securities owned by the respective Banks.

Under the Act of 1868, the shares of stock of National Banks continued taxable, by the State, as under the Act of 1864, *but the proviso in the Act of 1864, authorizing and requiring a similar taxation of the shares of stock of State Banks, was repealed* and no substitute was enacted in the place of said proviso.

THE PRIMARY AND CONTROLLING OBJECT OF THE FINANCIAL LEGISLATION OF CONGRESS, IN CONNECTION WITH THE WAR OF 1861-1865, AND THEREAFTER, AS AFFECTING THE ACT OF 1868.

The primary object of all of these Acts of Congress was to secure to the U. S. Government *more credit* and *more money*. What was imperatively needed was the *immediate use of larger sums of money*, part to be raised by taxation, some payable in

gold and some payable in United States Notes, commonly known as U. S. Notes or Legal Tender Notes or Greenbacks, some payable in U. S. Treasury Notes; to secure other sums of money by the sale of U. S. Bonds, or other U. S. Securities, some of which bonds were convertible into U. S. or Legal Tender Notes. Also to enable the Government to obtain credit, wherever it could do so, by a voluntary or compulsory acceptance of its bills of credit, that is Legal Tender or Treasury notes, to be paid out to its creditors to whom it was indebted for services rendered or supplies furnished, including payments to the soldiers, sailors, and marines in the service of the United States.

As part of the foregoing methods of obtaining money and credit, and, to that end, to induce the organization of National Banks, the Acts of Congress further provided that the Banks organized under the National Banking Act, might issue notes to circulate as money to the extent of 90 per cent of the market value of the United States Bonds, ($30,000 or more, but not less than one-third of the capital stock paid in), deposited with the proper officer, the Treasurer of the United States, and these National Bank notes were made receivable, at par, in all parts of the United States, in payment of taxes, excises, public lands, and all other dues to the United States, except duties on imports, and also for all salaries and other debts and demands owing by the United States to individuals, corporations, and associations within the United States, except interest on the public debt, and in redemption of the National currency. (Rev. St. U. S., Sec. 5182.)

There is not the slightest indication anywhere, in all of this legislation, prior to the National Banking Act of 1864, of the purpose or intent of Congress to lose or part with any opportunity to sell its bonds and securities at the best price obtainable therefor, which it previously had, without the aid of the foregoing legislation, and without interference, in any way, by the State, by taxation or otherwise. The main purpose of all of this legislation was to procure, for the government, *additional* credit and *additional* money, which the means existing, prior to said new legislation, were inadequate and insufficient to meet, because the demands for money were so great and the means usually relied on were already practically exhausted.

Prior to the adoption of the first of the National Banking Acts, in February 1863, the possible purchasers of U. S. Securities, including its Bonds, were subject to classification, as follows:

1: Foreign Bondholders;

2: All Federal Corporations, excluding National Banks, which were not in existence then, (organized under or by virtue of Acts of Congress,) which possessed the power to purchase such Securities.

3: Natural persons and co-portnerships domiciled within the United States.

4: Corporations and Joint Stock Companies organized under State laws, having power to purchase such U. S. Securities. Of these the State Banks were the principal purchasers of U. S. Securities.

5: Any of the foregoing, taking the legal title, while the equitable or beneficial ownership was in one or more other and distinct persons.

After the first National Banking Act was adopted, a new class was added, which *must* invest part of its capital in U. S. Bonds, and which *might* invest a greater part or all of its capital in such Bonds, thus adding class,

6: National Banks.

At the time the first National Banking Act was adopted, in February 1863, purchases of Bonds by Foreign Bondholders had practically ceased. In the quotation, *supra*, from MR. JUSTICE STRONG'S, opinion in *Knox v. Lee-Legal Tender Cases*, 79 U. S. (12 Wall.) 540, 20 Law 309, the statement is made: "Foreign credit we had none." (Page 540, Law Page 309.)

At the same date, the funds of State Banks and other State corporations, available for loans to the Government, by way of investments in U. S. Securities, were also practically exhausted. The same quotation, previously made from the opinion in the *Legal Tender Cases*, contained the statement: "Moneyed in- "stitutions in the United States, had advanced largely of their "means, *and more could not be expected of them.* They had been "compelled to suspend specie payments." This refers mainly to the State Banks which had suspended specie payments.

Nevertheless, the First National Banking Act of 1863 left intact, the constitutional immunity, from State taxation, directly or indirectly, of U. S. Securities, by whomsoever held, whether the title or interest was legal or beneficial, including National and State Banks.

The science of Banking which is a vitally important element in this case, is the making of money by the investment of the funds of others, the depositors, united with the funds of the Bank, keeping on hands money, or securities readily convertible into money, sufficient in amount to meet promptly, every time obligation of

the Bank, as fast as it matures; and, as to demand obligations, by keeping on hand, in money or convertible Securities, such percentage of the capital and deposits, as a long and large experience has demonstrated to be adequate, to promptly meet that class of the obligations of the bank when demanded. No Bank can succeed in operating a successful and remunerative business, without receiving deposits. The mere right to receive them is not sufficient; the deposits must be actually secured. The larger the proportion of the deposits to the capital, the more profitable the business to the Bank, and the investors therein.

In *Bank of Redemption v. Boston*, 125 U. S. 67, 31 Law 693, opinion by MR. JUSTICE MATTHEWS, this Court said: "But shares "of the National Banks, while they constitute the capital stock of "the corporations, do not represent the whole amount of the "capital actually employed by them. They have *deposits*, too, "shown in the present record to amount, in Massachusetts, to "$132,042,332. The Banks are not assessed for taxation on any "part of these, although *these deposits constitute a large part of "the actual capital profitably employed by the Banks in the con-"duct of their banking business.*"

It is true that the privilege of issuing Bank notes to circulate as money was a valuable one, but its value depended very much upon the restrictions placed upon the issuance of the circulating notes, and the security for their redemption required by law. In the National Banking Acts these restrictions were stringent.

Under the National Banking Acts, circulating notes could be issued only to the extent of 90 per cent of that part of the capital actually invested in U. S. Bonds after the Bonds were deposited with the U. S. Treasurer; as to 10 per cent of this investment in U. S. Bonds, the only income receivable thereon, was the rate of interest paid by the Government, which although a high rate for a Government to pay, was a low rate compared with that receivable on commercial loans and discounts, which are usually made for short terms of 60 or 90 days, so that the interest received was compounding itself from 4 to 6 times a year, while the interest paid by the Government was simple semi-annual or annual interest.

As to the other ninety per cent of the Bank's investment in U. S. Bonds, the Bank issued and loaned its own notes to that extent, less a reserve for redemption thereof, receiving commercial rate or interest thereon, in addition to the interest paid by the Government on its bonds, which was an important element of profit.

Nevertheless, notwithstanding this privilege, these National Banks could not pay the taxes imposed by the Government, with-

out any taxation by the State, together with the necessarily heavy expense of conducting a Bank, and, in addition, earn a fair or good rate of remuneration on the capital invested in the Bank, unless the Bank also received a considerable amount of deposits.

It is doubtless true that a National Bank, with its special privileges, could successfully conduct a paying banking business, with a smaller relative proportion or percentage of deposits to capital, than could be done by a State Bank, not having these special privileges; but a National Bank must have deposits to be successful.

It must further be remembered that idle capital in a Bank earns nothing, and to earn dividends the Bank must secure patrons or customers, able to give the requisite security, to whom its funds could be loaned; otherwise the Bank would not be successful.

The securing of depositors to make deposits in the Bank, and obtaining patrons or customers to whom the funds of the Bank could be safely loaned, depends mainly upon the good will of the local capitalists, investors and business men of the vicinity where the Bank is located. Congress, by its enactments could give the National Banks powers and privileges, but, by its enactments, Congress could not give the National Banks, a banking business. It was precisely in these elements that the National Banking Act of 1863 was weak and defective.

The causes of hostility to National Banks, when instituted under the Acts of 1863-1864, were partly political, party constitutional or legal, and partly commercial. The political and constitutional or legal objections were unavoidable, but were really of a temporary character, and this is especially true as to the constitutional or legal objections, which, in due course of procedure, and after a few years of time, would be and were settled by this Court. The political hostility began to disappear at or shortly after the close of the War.

The commercial objections, as we have termed them, were mainly due to an inherent defect in the original Act itself. That an institution, organized under Federal law, should come into a State, receive police and fire protection, and all other benefits derived from the expenditure of State and local taxation, without contributing any part of the public taxes necessarily levied to furnish this protection and these benefits, was not calculated to secure to these institutions the good will of the capitalist, investing, and commercial classes that is, the tax paying classes, of the various communities in the different States where the Banks located and attempted to engage in business. The natural and inevitable effect

of such legislation was promptly and severely or unfavorably felt by the new National Banks.

The result was, that in the following year, 1864, as a matter of common fairness and justice, and to secure a successful development of the new Banking system, the National Banking Act was amended so that these institutions indirectly, and the stockholders, as owners of the capital stock of the Bank, directly, should pay their proper proportionate share of the taxation necessary to furnish police and fire protection, and the other benefits derived from the expenditures of the public State and local taxes. This was equitable, prudent, and directly beneficial to the National Banks, in securing the good will of the investing and taxpaying classes of local citizens.

While this change in the Act was intended to and did remove the objections of the capitalist and commercial classes, based on the complete immunity from State taxation of such National Banking institutions and of the investors in the stock of such National Banks, it was still deemed necessary to protect these Associations from the ill-will or hostility to them, based upon other grounds, and, so as to effect this result, the two clauses, one concerning other moneyed capital and the other relating to taxation of State Bank shares of stock, were inserted in Section 41 of the Act of 1864, which accomplished the desired result in preventing discriminating or hostile State *taxing* legislation, adverse to National Banks.

It was soon discovered, however, that this Act of 1864 had, in another aspect of its commercial effect, withdrawn from investors in State Banks, all of the immunity from taxation of U. S. Bonds, so far as it affected the *net earning power* of their investment. While a *legal* differentiation or distinction had been drawn between the capital of the State Bank, and the shares of its stock in the hands of the shareholders, those who were investors in State Banks did not draw any such refined distinction. They looked only at the *net income* derived from their investment. It made no difference to the investors whether a deduction, by way of a State tax, from the gross income, derived from their investments in the State Bank, was made from the aggregate earnings of the Bank, while still in the hands of the Bank, before division and payment thereof to the investors, or whether the same proportionate deduction, by way of a tax, was made from the sum paid to them by the Bank, as earnings, after the investors had received such payments.

In either case, from the investors standpoint, the NET SUM received and available to the investors, was their share of the aggre-

gate earnings of the State Bank less each investors proportionate part of the deduction caused by State taxation. The investor ultimately paid the tax, and lost the tax so paid.

The only inducement which the United States could offer to a natural person, or to a corporation organized under State laws, to cause or induce him or it to invest capital in United States Securities, was the immunity of his investment from taxation under the authority of the State. This immunity was, in practical effect withdrawn from investors in State Bank shares of stock, by the Act of 1864, which had the inevitable consequence and effect of making U. S. Securities, with their low rate of interest, an undesirable and unprofitable investment to the stockholders of State Banks. Aside from and previous to the organization of National Banks, it was the State Banks that furnished by far the largest part of loans made to the Government, through the purchase of U. S. Securities, and it is the stockholders of the State Bank who control the Banks policy in matters of investment.

It is here important to note, that notwithstanding the apparent identity or similarity of the provisions in the Act of 1864, for the taxation of the shares of stock of National Banks and the shares of stock of State Banks, constitutionally and legally the basis of the State taxation rested ultimately upon entirely different grounds.

Permissive legislation enacted by Congress was necessary to authorize any taxation whatever upon National Bank shares, the National Banks being means or instrumentalities of carrying on the operations of the Government; the same proposition is true as to the taxation of the value of the shares of stock of either National or State Banks, in so far as such value was derived from investments of the Bank capital in United States Securities. To this extent the authority to tax is identical in each case, viz; permission given by Congress, auhorizing the State to tax these several subjects-matter, otherwise immune from State taxation.

But it was settled in *Van Allen v. Assessors*, 70 U. S. (3 Wall) 582-583, 18 Law 233-234, that the State tax, authorized by Congress to be imposed upon the shares of stock of National Banks, is a burden imposed by the National Government upon these Associations, as conditions to the grant, by Congress, to them, of chartered rights and privileges of great value to the corporations. It is essentially a franchise or privilege tax, computed on the basis of the value of the shares of stock in the hands of the individual shareholders. In this respect it is very similar to the tax imposed in *Society for Savings v. Coite*, 73 U. S. (6 Wall) 594, 18 Law 897 opinion by MR. JUSTICE CLIFFORD, decided in 1868, in which it was

held that the reference made, in the statute there considered, to the total amount of the deposits on the day named, is for the purpose of taxing the corporate franchises granted, and not as defining the subject matter of taxation.

But State corporations and their shares of stock stood on an entirely different footing. The National Government had not granted and could not grant any corporate franchises or privileges to any corporation organized under State Laws. Whatever tax was imposed upon State Bank shares of stock, under the authority of the proviso in Section 41 of the Act of 1864, was, to the extent that the value of such shares was derived from the investment of the Bank capital in U. S. Securities, a tax upon that part of the value of the shares derived from those U. S. Securities, imposed under the permissive authority of Congress, which Security had previously been immune from taxation.

The Act of 1864, therefore, discriminated strongly against State Banks, and doubtless, was intended so to do, as there were important and urgent reasons of National policy which induced Congress, at that time, to foster National Banks at the expense of State Banks. But the following discriminations against State Banks, which are stated below, were made all the same.

(A) The franchises and privileges of National Banks were granted by the National Government, and were wholly beyond the control of the State Government, and were, also, non-taxable by the State without permission of Congress. State Banks were necessarily under the control of the State, and, in some important respects, were also subject to National legislative control. Restrictions and limitations imposed upon State Banks for the security of depositors, such as a limitation of the ratio of deposits to capital, and to prevent defalcations by State Bank officials, could not affect National Banks or the officers of such banks.

(B) The special franchises and privileges granted by Congress to National Banks, were deemed a sufficient consideration for the State taxation which the State was authorized by Congress to impose on National Bank shares of stock. State Banks received from Congress, no franchises, privileges or other consideration whatever, for the State tax they were required to pay.

(C) National Banks were authorized to issue their own notes, to circulate as money, which was an advantageous privilege. On the other hand, the right to issue circulating notes, which many State Banks had previously possessed and exercised, under authority from the State, was taxed to death and destroyed by National Legislation.

(D) The immunity from taxation by the State of the legal title to U. S. Securities owned by State Banks, or of the beneficial interest therein, which, through the shares of stock, the investors in such State Bank stock had previously enjoyed under the U. S. Constitution, was withdrawn or destroyed by the Act of 1864. While National Banks were APPARENTLY on the same footing, they were not so in reality, because National Banks had received, by the Act of 1864, *full consideration* for all the taxes imposed on them by the State, while the State Banks received no consideration whatever from the Act of 1864, for this additional tax which the State was compelled to impose on State Bank shares, if the State elected to tax National Bank shares of stock.

(E) State Banks were now compelled to meet a new competition from National Banks for the ordinary banking business of their several communities, and in this competition, the National Banks had been specially favored and fostered by National legislation, while the State Bank had been handicapped and retarded by hostile, or at least, adverse, National legislation.

The full effect upon investors in State Bank shares of stock, where more or less of the bank capital was invested in U. S. Securities, of the proviso contained in Section 41 of the Act of 1864, concerning the taxation of State Bank shares of stock, was not generally discovered, or at least, was not fully and generally known and realized, until after the decisions rendered by this Court, in 1866 and 1867, in the cases of *Van Allen v. Assessors; People v. Commissioners,* and subsequently in other cases previously cited.

At the time these decisions were rendered the War had fortunately closed, most of the armies and navy had been disbanded and the remainder reduced from a war to a peace footing, and all of the immense extraordinary expenditures caused by the conduct of the war, had ceased. The problem now before Congress was an entirely different one, and raised altogether new questions. The purpose was to reduce everything to a normal peace footing as speedily as could be safely done.

From the time of the passage of the first National Banking Act in 1863, until the close of the War, the Government was compelled to rely almost entirely upon these new National Banks for sales of additional U. S. Bonds. As previously stated, there were few or practically no foreign investors, and State Banks, the largest previous investors in U. S. Securities, were already carrying all the Government Securities that they were able to carry or desired to carry. No special effort was therefore made by Congress, during the period from 1863 to near the end of 1867, to secure or encourage investments by State Banks, in such Federal Securities.

In 1867 and 1868, the new financial problem was to re-organize, rearrange and refund the indebtedness of the United States, at a lower rate of interest, on extended time, so that the Government debt would be in process of liquidation and reduction, and, at the same time, to permit some reduction of the burdensome taxation imposed by Congress for the purpose of successfully prosecuting the War. The practical legislative question was how best to effect these results.

These questions had been under consideration in 1867, and entered largely and actively into the political, newspaper and popular discussions and controversies, preceding the Conventions held in the different States during the early months of the year 1868, to select delegates to the National Conventions of the different political parties to nominate candidates for President and Vice-President; and were the subject of resolutions passed by many of these early State Conventions. They were the subject, in the general phraseology of such utterances, of the resolutions of the two great political parties in their National Conventions held in 1868, and were discussed at length during the Presidential Campaign of 1868, which resulted in the election of General Grant to the Presidency of the United States.

As soon as the new President and the new Congress took their seats, on March 4th, 1869, the first Act passed at an extra Session of the new Congress, and the first Act signed by the new President, was, what is commonly termed, the Credit Strengthening Act. legally designated as the Act of March 18th, 1869, 15 St. at L. I, Ch. 1.(See, Rev. St. U. S. (1878), Section 3693) This was followed, at the first regular session of the same Congress, by, what we understand to be, the first of the general Refunding Acts, passed for refunding U. S. Bonds and Securities issued during the War, legally known as the Act of July 14th, 1870, 16 St. at L. 273, Ch. 256. (See, Rev. St. U. S. (1878), Section 3695-3697.)

The main purposes of the Bond Refunding Acts were to issue Bonds, in very large amounts, bearing a lower rate of interest, so as to reduce the tremendous annual interest charge which the Government had to pay, and, by selling the new issues of Bonds, to obtain money and to use the proceeds to pay off and discharge or redeem the outstanding U. S. Securities, bearing higher rates of interest or containing more onerous conditions, and to arrange the dates of maturity of the new bonds so that the government could redeem or pay them off as they matured.

A necessary preparatory step to this refunding scheme was, for Congress to take whatever steps were *necessary to secure all possible purchasers of the immense issues of new bonds about to*

be made, and among these available purchasers, were the State Banks, whose good will or willingness to purchase the new bonds must be secured, which could only be effectively done by restoring the ancient and time-honored principle of the Constitution and of Congress, that the State should not, in any manner, by taxation or otherwise, interfere with the power of the United States, to effect loans and sell its securities at the best price possible. That is to restore the status of Constitutional and Statutory Federal law existing prior to the Act of 1864. While the National Banking Acts were in force the National Banks had purchased heavily of U. S. Securities, but the State Banks had relieved themselves to a considerable extent, changing their position in this respect compared with what it was in 1862, 1863 and 1864.

The problems therefore, which Congress had to meet, in a practical way, were these:

1. To require investors in National Banks to pay a fair and proportionate share of State taxation, such as was provided for in Section 41 of the Act of 1864:

2. To restore to investors in State Bank shares of stock the *complete immunity* of U. S. Securities from taxation, directly or indirectly, by the State, whether imposed upon the capital so invested or upon the Federal Securities themselves, or on the beneficial ownership of such Federal Securities by the investors through the shares of stock of the State Banks, which immunity the investors in State Bank shares of stock had enjoyed under the Act of 1863, and at all times prior to the Act of 1864.

3. To prevent hostile or discriminating taxing legislation, by the State, against the shares of stock of National Banks by compelling the State to impose a tax upon *all moneyed capital, within the power of the State to tax,* which came into competition with the BANKING BUSINESS of the National Banks, with the requirement that the tax imposed by the State upon its own banking institutions or the investors therein, might be greater or equal to, but could not be less, than the rate of taxation imposed upon the investors in shares of stock of National Banks. This was effected by the '*other moneyed capital*' clause.

These results were certainly attained by the Amendatory Act of 1868, if we are correct as to its policy, interpretation and construction. In this way the National Banking Acts were made a part of the permanent Federal legislation, on a peace footing, and the extraordinary departure from the previously established immunity of Federal Securities, directly or indirectly, from State taxation, which had been introduced by the proviso in Section 41

the Act of 1864, was treated as a War Measure, and repealed, on as possible after peace was restored.

In this way the ancient and long followed policy of Congress as reverted to, that all U. S. Securities should enjoy the Constitutional freedom from taxation, by the State, directly or indirectly, upon or against the legal or beneficial ownership thereof, and the proviso of Section 41 of the Act of 1864, authorizing and requiring a taxation by the State of the full value of the shares of stock of State Banks, was repealed, because it was no longer needed after the close of the War, and had become a hinderance to and interference with the new policy which Congress was about to put in force, by the sales of the U. S. Bonds, bearing a lower rate of interest, so as to relieve the people of the United States from the crushing burden of taxation necessary to pay the interest and reduce the principal of the huge National debt then existing.

Stating it in a different form, our contention is, that the Constitutional immunity of U. S. Securities, held by State Banks, from taxation, directly or indirectly, by the State, has continued in force during the entire existence of the United States Government, except during the period of about four years from 1864 to 1868, when the proviso of Section 41 of the Act of 1864, concerning the taxation of the shares of stock of State Banks, was in force.

For the reasons, already stated, whether the tax on the National Bank shares of stock be regarded as in the nature of a franchise or privilege tax, or as a tax, by permission of Congress, on the full value of the shares including the beneficial interest, through the shares of stock, of the U. S. Securities owned by the National Bank, the beneficial grant of franchises and privileges was regarded as sufficiently valuable to justify Congress in authorizing taxation by the State, of National Bank shares of stock, to the extent provided by the Act of Congress, accompanied as it was by a limitation or restriction upon the power of the State to discriminate in favor of State Banking capital and investments therein, so far as these subjects-matter of taxation were within the power of the State to tax, without permissive legislation enacted by Congress.

The importance to the United States of keeping its power to borrow money wholly free from any interference therewith by the State, by taxation or otherwise, has been stated so often in the decisions of this Court, previously cited in this brief, that further reference to that point is not necessary.

Nevertheless there is a clear-cut well defined statement of the proposition in a recent decision of this Court, which we therefore ask permission to quote. In *Hibernia Savings & Loan Soc. v. San*

Francisco, 200 U. S. 313, 50 Law 496, opinion by MR. JUSTICE BROWN, this Court said: "The efficiency of the government ser- "vice cannot be impaired by a taxation of the agencies which it "employs for such service, and as one of the most valuable and "best known of these agencies is the borrowing of money, *a tax "which diminishes in the slightest degree the value of the obliga- "tions issued by the government* for that purpose impairs *pro tanto* "their market value." All of the legislation of Congress relating to the taxation of National Banks must be considered, construed and interpreted in harmony with this important principle.

In the *Mercantile National Bank case*, referred to *supra*, the opinion said: "The main purpose, therefore, of Congress, in fix- "ing limits to State taxation on investments in the shares of Na- "tional Banks, was to render it impossible for the State, in levy- "ing such a tax, to create and foster an unequal and unfriendly "competition, by favoring institutions or individuals carrying on "a similar business, and operations and investments of a like "character. The language of the Act of Congress is to be read "in the light of this policy." (121 U. S. Page 155, Law Page 901).

This Congressional policy is fully and effectively carried out by requiring the State to tax all of that class of capital which is within its power to tax, without Congress permitting taxation by the State of U. S. Securities, directly or indirectly, or requiring the State to tax other moneyed capital, properly exempted by National or State laws from taxation by the State. The capital of a State Bank invested in U. S. Securities, is, so long as that investment continues, not used in active competition with the banking business of loans, discounts and exchanges of the National Banks. This construction of the Act of 1868, has the further merit of not permitting the State, by its taxing laws, to interefere with sales by the United States of its securities to such State Banks, while affording full protection to the banking business of National Banks.

A CONSTITUTIONAL EXERCISE, BY CONGRESS, OF ITS LEGISLATIVE POWER IS NOT SUBJECT TO REVIEW BY THE JUDICIAL DEPARTMENT: That this Court has no power to review the exercise, by Congress, of its Legislative powers and discretion, within Constitutional limits, is well settled by numerous decisions of this Court.

In *Knox v. Lee-Legal Tender Cases*, 79 U. S. (12 Wall) 539 540, 20 Law 308, the opinion written by MR. JUSTICE STRONG, says:

"The case, (*McCulloch v. Maryland*, 4 Wh. 405), also marks "out with admirable precision the province of this Court. It de-

"clares that 'when the law, (enacted by Congress), is not pro-
"'hibited and is really calculated to effect any of the objects in-
"'trusted to the government, to undertake here to inquire into
"'the degree of its necessity would be to pass the line which cir-
"'cumscribes the Judicial Department and to tread on Legislative
"'ground. This Court, (it is said), disclaims all pretensions to
"'such power.' It is hardly necessary to say that these principles
"are received with universal assent. Even in *Hepburn v. Gris-*
"*wold*, 75 U. S. (8 Wall) 603, 19 Law 513, both the majority and
"minority of the Court concurred in accepting the doctrines of
"*McCulloch v. Maryland*, as sound expositions of the Constitu-
"tion." (Page 539, Law Page 308.)

Also: "Before we can hold the Legal Tender Acts unconsti-
"tutional, we must be convinced they were not appropriate means,
"or means conducive to the execution of any or all of the powers
"of Congress, or of the Government, not appropriate in any de-
"gree (for we are not judges of the degree of appropriateness),
"or we must hold that they were prohibited." (Page 539, Law
page 308).

Also: "Is it our province to decide that the means selected
"were beyond the constitutional power of Congress, because we
"may think that other means to the same ends would have been
"more appropriate and equally efficient? That would be to as-
"sume legislative power, and to disregard the accepted rules for
"construing the Constitution. The degree of the necessity for any
"congressional enactment, or the relative degree of its approp-
"priateness, if it have any appropriateness, is for consideration in
"Congress, not here. Said CHIEF JUSTICE MARSHALL, in *Mc-*
"*Culloch v. Maryland*, as already stated, 'When the law is not
"'prohibited, and is really calculated to effect any of the objects
"'intrusted to the government, to undertake here to inquire into
"'the degree of its necessity, would be to pass the line which cir-
"'cumscribes the Judicial department, and to tread on Legislative
"'ground.'". (Page 542, Law Page 309).

In the same cases, (*Legal Tender Cases*), the concurring opinion, written by MR. JUSTICE BRADLEY, on the same subject, said:

"But it is said, why not borrow money in the ordinary way?
"The answer is, the Legislative Department, being the nation it-
"self, speaking by its representatives, has a choice of methods, and
"is the master of its own discretion." (Page 561, Law page 315).

In *Veazie Bank v. Fenno*, 75 U. S. (8 Wall) 548, 19 Law, 488, concerning the claim that a tax imposed by Congress upon the cir-

culation of State Bank notes was so excessive as to indicate a purpose on the part of Congress to destroy the franchise of the bank and was, therefore, beyond the Constitutional power of Congress, the opinion written by MR. CHIEF JUSTICE CHASE said:

"The first answer to this is that the Judicial cannot prescribe "to the Legislative Department of the government limitations upon "the exercise of its acknowledged powers. The power to tax may "be exercised oppressively upon persons, but the responsibility of "the Legislature is not to the Courts, but to the people by whom "its members are elected. So if a particular tax bears heavily "upon a corporation, or a class of corporations, it cannot, for that "reason, only, be pronounced contrary to the Constitution." (Page 548, Law page 488).

In *Pacific Insurance Co. v. Soule,* 74 U. S. (7 Wall), 443 19 Law 98 the opinion by MR. JUSTICE SWAYNE said:

"Where the power of taxation, exercised by Congress, is war- "ranted by the Constitution, as to mode and subject, it is, neces- "sarily, unlimited in its nature. Congress may prescribe the basis, "fix the rates, and require payment as it may deem proper. Within "the limits of the Constitution it is supreme in its action. No "power of supervision or control is lodged in either of the other "departments of the government."

DIVISION V. (ORIGINAL BRIEF, PAGE 44).

IS THERE AN IMPLIED RIGHT ON THE PART OF AN IOWA STATE BANK, TO SUE FOR AND RECOVER FROM ONE OF ITS SHAREHOLDERS, A TAX PAID BY SAID BANK, ON THE SHARES OF STOCK OF SUCH STATE BANK IN THE HANDS OF SAID STOCKHOLDERS?

IN IOWA LAW, THE STOCKHOLDER HAS PAID THE TAX: Unless some private right exists in favor of a person, natural or artificial, and such right has been infringed, or unless some wrong has been done to a person, natural or artificial, such person can have no remedy, statutory or implied, to redress an alleged infringement of a right, or to redress an alleged wrong, because, in contemplation of law, there is nothing to remedy, since there is no right existing, or no right infringed, or no wrong done.

The decisions of the Supreme Court of Iowa, concerning the payment, by a State Bank, of taxes on the shares of stock in the hands of a shareholder, as we understand them, are, that no right of the State Bank has been infringed, no wrong done to said Bank, that the Bank has no right to recover from the share holder, and that the statutes of Iowa, which are exclusive as to the remedy, re-

fused to the Bank any right to sue; that such state statute law is not in contravention of the Federal or State Constitutions, in refusing any remedy by way of recoupment, to the Bank from the shareholder. Under decisions of this character, the State Courts will certainly not imply a right of the Bank to recover, by action, from the shareholder, the taxes paid by the Bank on the shares of stock belonging to the shareholder.

The theory of the Iowa decisions, is that when the Bank paid the tax, in reality or finality the shareholder paid and lost the tax, out of his dividends, or surplus, or capital, or out of the value of his shares, and the tax was thereby ultimately paid by, and lost to, the shareholder; and that a right of recovery, given to the Bank, would be a mere idle and useless ceremony, which does not affect any substantial or legal right of the Bank, or of the share holder.

There is no room for any doubt as to the theory upon which the decisions of the Supreme Court of Iowa are based. Concerning *Primghar State Bank vs. Rerick*, 96 Iowa 348, the Iowa Supreme Court, in *German-American S. Bk. vs. Burlington* (City), 118 Iowa 84, said:

"And it is said in answer to the *contention* that the Bank under "such circumstances, *would be paying taxes on property that it "did not own*, that 'as the capital of a State Bank is really owned "'by the stockholders, and as it is reduced by the amount paid "'for taxes, its value is reduced by a sum equal to that paid, and "'the shareholders do, in effect, pay the taxes.' This proposition "cannot be successfully controverted, for the reason that the Bank "is owned by its stockholders, and, if it is making money, and is "paying dividends or reserving a surplus, the payment of the tax "by the corporation, instead of by the individual stockholders, "affects the value of the stock exactly the same; and this is equally "true if the bank is not prosperous."

In brief, this decides that the shareholders ultimately pay and lose the tax advanced by the Bank out of the shareholders dividends, or their surplus, or their capital, or by means of the diminished value of their shares of stock, all of which are legally or beneficially owned by the shareholders. If this is true, there can be no right of recovery implied, because the payment of the tax has already, as matter of State law, fallen on the true tax debtor, the shareholder, and the bank will not be permitted to recover from the shareholder a debt, which in contemplation of law, the shareholder has already paid. Now, if this be or in so far as this is, a question of State law, the decision of the Supreme Court of Iowa on that point cannot be brought here for review. Its decision is final.

That this is the legal effect of the Iowa decisions, is further established by a reference to the statement made by the Iowa Supreme Court, with reference to the decision of this court, in *Van Allen v. Assessors,* (3 Wall) 573, as contained in *Primghar State Bank,* 96 Iowa, 243-244, as follows:

"In the case of *Hubbard v. Board,* 23 Iowa 143, a distinction "based upon *Van Allen v. Assessors,* (3 Wall) 573, between tax- "ing the capital stock and the shares of the capital stock, of a "bank, was recognized, but it cannot with any justice be said that "inequality of taxation results from taxing the shares *separately* "*to their owners* and taxing them *collectively to the Bank.* The "aggregate capital of an incorporated bank is virtually owned by "its stockholders, and each share represents a definite part of the "whole. (Citations). Therefore, the aggregate of the taxes "levied upon the separate shares would be the same as those levied "upon the separate shares taken together, or upon the capital "stock."

Upon any question of State law involved in this decision, the decision is conclusive; but as to any Federal questions it involves duly presented by the record in this case, plaintiff in error is entitled to ask for the judgment and decision of this court.

Doubtless, the opinion cited, intends to hold, as to Banks organized under Iowa law, that the legal question involved are purely matters of State law, are not in conflict with *Van Allen v. Assessors;* otherwise the conclusion would have to be arrived at that the Supreme Court of Iowa has seen fit to disregard the decisions of this court, on a matter of Federal law, which would not be just or courteous to that Court.

Van Allen vs. Assessors, held that Federal instrumentalities and Federal securities were *immune* from taxation, directly or indirectly, by the State, except to the extent and in the manner permitted by Congress; that Federal securities held by a State Bank and the beneficial interest therein owned by the shareholders through the shares of stock, were immune from taxation, directly or indirectly, by the State, except to the extent and in the manner provided by Congress; and in granting permission to the State to tax such interest in Federal securities, through the shares of stock of the State Bank, Congress had differentiated on the one side, between the ownership of the *capital* of the Bank, so far as invested in Federal securities, and, on the other side the *shares of stock* owned by the shareholder, to the extent that the value thereof was derived from the Federal securities in which the capital of the Bank, or some part thereof, had been invested; but this differentia-

tion, made by Congress must be conformed to and complied with by the State, in taxing the value of the shares of stock of the State Bank derived from U. S. Securities. It has been subsequently held by this Court, that a claim, that some other mode of taxation by the State is the *equivalent* of the mode prescribed by Congress, is unsound and untenable, but the State must comply with the Act of Congress authorizing the taxation of the shares of stock of the State Bank to the extent of the value imparted to them by the U. S. Securities owned by the Bank, otherwise the State would be without any power to tax such value.

Assuming, for the purpose of this argument only what we have elsewhere strenuously denied, and without waiving our contention to the contrary, that when the assessment in question was made, there was some Act of Congress authorizing the taxation of that part of the value of the shares of State Bank stock derived from U. S. Securities owned by the Bank, this taxation can only be imposed by the State because Congress has permitted it, by differentiating the ownership of the shares from the ownership of the capital. It is certain that the capital of the State Bank, so far as invested in Federal securities, or the Federal securities themselves, owned by the Bank, are not taxable, but under this differentiation, made by Federal law, the capital belongs to the Bank, the shares belong to the individual shareholders. Therefore, in Federal law, the shareholders do not pay a tax which the Bank has paid from its capital or assets, as the latter are not the property of the shareholders.

As to these Federal questions, involved in the case, the Iowa decisions, above referred to, are erroneous, but until reversed, the holding of the Supreme Court of Iowa, is, that the shareholder has ultimately paid the tax, which the Bank merely advanced, from the shareholders property, funds, assets, or values, and the Bank cannot recover, from the shareholder, a tax, which the shareholder has already paid, and no right to recover the same from the shareholders will be implied by State law, in favor of the Bank paying the tax.

THE IOWA STATUTORY REMEDY IS INTENDED TO BE COMPLETE AND EXCLUSIVE:

It is the general rule, at common law, concerning Statutory remedies, that:

"A statute instituting a new remedy for an existing right does not take away a pre-existing remedy without express words or necessary implication; the new remedy is cumulative and either may be pursued. But when a statute gives a right or remedy which

did not exist at common law, and provides a specific method of enforcing it, the mode of procedure provided by the Statute is exclusive, and must be pursued strictly. *26 Am. & Eng. Enc. of Law* 671, Title *'Statutes'*".

In Iowa, for many years it was deemed settled law, under the decisions in *Burlington (City) v. Railway Co., 41 Iowa, 139, and Dubuque (City) v. Railroad Company,* 39 Iowa, 157, that where a special remedy was provided for the collection of a general tax and the tax was also, by the same statute, declared to be a *debt,* the right to sue for the tax, *as a debt,* was cumulative to the special statutory remedy. But in *Crawford County v. Laub,* 110 Iowa 357, the foregoing question was declared to be still an open one, in Iowa, because but *two* of the *four* judges concurred in those prior opinions. Nor was the point settled in the *'Crawford County'* case, although the opinion says "the decided weight of authority " is that the particular remedy provided by statute is exclusive". (Page 357). The case did decide, that a lien given by statute, for a mulct law liquor tax, was not collectible in equity, although said tax is a debt personally of the proprietor and his sureties.

In *Plymouth County v. Moore,* 114 Iowa 701, the County sued for the amount of a tax levied upon a stock of goods, which, by statute, was made a lien on said stock of goods, and a method of enforcing said lien was provided by statute. The holding was, that the County could not maintain the action, because in adopting the remedy, provided in the statute, "the legislature must be held " to have intended to exclude any other proceedings". (Pages 702-703).

In *Shearer v. Citizen's Bank,* 105 N. W. (Iowa) 1025, plaintiff as Treasurer of Washington County, Iowa, brought suit to recover from defendant certain omitted taxes. A demurrer to the petition was sustained, and a judgment was affirmed. The proceeding, by action, to recover omitted taxes, is statutory; and the Supreme Court of Iowa said, that: "but for the statutes to which we have " referred, no action at law would lie for the recovery of taxes on " omitted property or otherwise", (page 1026—left column), and the holding was, that the action was barred, not having been brought within the five (5) years allowed by the statute therefor.

Code of Iowa, (1897), Sections 1322, 1323 and 1325, purport to cover the whole subject of the taxation of the shares of stock of National Banks, State and Savings Banks, and Loan and Trust Corporations, and all other Corporations organized under the laws of Iowa; also providing by what corporations such taxes shall be paid, and in what cases recoupment from the shareholder shall be

allowed in favor of the corporation. These provisions have been held by the Supreme Court of Iowa, to be in accordance with the State Constitution, and not in violation of the U. S. Constitution, concerning direct or indirect taxation by the State of U. S. Securities, nor in violation of Article XIV of the Amendment to the U. S. Constitution, concerning due process of law and the equal protection of the laws.

This statute was, doubtless drawn in harmony with, and under the authority of, the case of *Primghar State Bank v. Rerick*, 96 Iowa 238, cited *supra*, which was decided on October 25th, 1895, and the Code of Iowa, of 1897, was adopted during the extra session of the 26th General Assembly of Iowa, held during the year 1897 which went into effect on October 1, 1897.

It was intended by these statutes, that the right of recoupment, given by these sections, should be exclusive, and exist only when and as given, and should not exist where it was not given, by statute The underlying reason for the action of the Legislature, as to the Banks, was its acceptance of the rule laid down in the *'Primghar Bank'* case, viz: that the stockholders had actually paid and lost the tax, which the Bank had merely advanced for the benefit of the stockholders, and there being no debt, there ought not to be any right of recoupment, although a different rule was established by Statutes as to other State corporations.

STATE BANK CORPORATIONS ARE PRIMARILY LIABLE FOR PAYMENT OF TAXES ASSESSED ON THE SHARES OF STOCK: We have already stated, in our original brief, that the purpose and intent of the foregoing statutes was to make the Bank primarily liable for the payment of the tax assessed upon the shares of stock of the shareholders; that in its ultimate purpose and effect, the Legislature intended to tax the Bank, and to use the value of the shares of stock belonging to the shareholders, merely as a measure of the amount of tax, which the bank should be required to pay. But when the Bank paid the tax, so assessed, for the payment of which the Bank was made primarily liable, the Bank was simply paying its own debt, and necessarily it had no right to recover from any body else, when it simply paid its own just debt.

Nor is there anything in the *'Primghar State Bank'* case, or in the *'German-American State Bank'* case, cited *supra*, not in harmony with this contention. The principle of those cases is, that, although the State Bank has paid the tax on the shares, it was *not paying the debt of another*. This is very clearly stated. But it was either paying the debt of another, or paying its own debt,—one of the two; and if it was not paying the debt of another, it must

have been paying its own debt, and was primarily and legally liable therefor. The opinion then goes one stage further, and holds, that because of the fact that the equitable or beneficial ownership of the bank capital, surplus, earnings and property, is in the shareholders, the ultimate loss of the tax, has fallen upon the shareholders.

This does not, in any manner, conflict with the prior proposition, that when the Bank paid the tax, it paid its own debt, and did not pay the debt of another, and therefore it had no legal right, statutory or implied, to recover from another, when it had only paid its own debt.

Respectfully submitted.

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